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No. 97-279

In the Supreme Court of the United States

OCTOBER TERM, 1997

DIMITRIOS KATSOULIS, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 440(a) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which precludes judicial review of final orders of deportation entered against aliens who have been convicted of certain serious crimes, divested the courts of appeals of jurisdiction over a petition for review that was pending at the time of AEDPA's enactment.

2. Whether deportation of petitioner without additional judicial review would violate the Due Process Clause, separation-of-powers principles, or the Suspension Clause.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	23

TABLE OF AUTHORITIES

Cases:

Bakelite Corp., Ex parte, 279 U.S. 438 (1929)	19
Boston-Bollers v. *INS*, 106 F.3d 352 (11th Cir. 1997)	12
Bruner v. *United States*, 343 U.S. 112 (1952)	10
Carlson v. *Landon*, 342 U.S. 524 (1952)	17
Chamorro-Torres v. *INS*, 117 S. Ct. 1106 (1997)	6
Chow v. *INS*, 113 F.3d 659 (7th Cir. 1997)	22
Crowell v. *Benson*, 285 U.S. 22 (1932)	19
De La Rama S.S. Co. v. *United States*, 344 U.S. 386 (1953)	10
Degen v. *United States*, 116 S. Ct. 1777 (1996)	9
Duldulao v. *INS*, 90 F.3d 396 (9th Cir. 1996)	11, 12, 15, 21
Fernandez v. *INS*, 113 F.3d 1151 (10th Cir. 1997)	11
Figueroa-Rubio v. *INS*, 108 F.3d 110 (6th Cir. 1997)	11-12
Finley v. *United States*, 490 U.S. 545 (1989)	19
Fong Yue Ting v. *United States*, 149 U.S. 698 (1893)	17
Galvan v. *Press*, 347 U.S. 522 (1954)	17
Gurnee v. *Patrick County*, 137 U.S. 141 (1890)	10
Gwin v. *United States*, 184 U.S. 669 (1902)	10
Hallowell v. *Commons*, 239 U.S. 506 (1916)	13, 19
Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952)	17

Cases—Continued: Page

Hernandez-Rodriguez v. *Pasquarell*, 118 F.3d 1034 (5th Cir. 1997) 15
Hincapie-Nieto v. *INS*, 92 F.3d 27 (2d Cir. 1996) 12, 21
Hughes Aircraft Co. v. *United States ex rel. Schumer*, 117 S. Ct. 1871 (1997) 12, 13
INS v. *Elramly*:
117 S. Ct. 28 (1996) 8
117 S. Ct. 31 (1996) 8
INS v. *Lopez-Mendoza*, 468 U.S. 1032 (1984) 8
INS v. *Yang*, 117 S. Ct. 350 (1996) 14, 20
Insurance Co. v. *Ritchie*, 72 U.S. (5 Wall.) 541 (1867) 11
Jay v. *Boyd*, 351 U.S. 345 (1956) 17
Keene Corp. v. *United States*, 508 U.S. 200 (1993) 19
Kline v. *Burke Constr. Co.*, 260 U.S. 226 (1922) 10
Kolster v. *INS*, 101 F.3d 785 (1st Cir. 1996) 12, 21
Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994) 8, 9, 10, 11
Lindh v. *Murphy*, 117 S. Ct. 2059 (1997) 12, 14, 15
McCardle, Ex parte, 74 U.S. (7 Wall.) 506 (1869) ... 10
Mendez-Morales v. *INS*, 119 F.3d 738 (8th Cir. 1997) 11, 14
Mendez-Rosas v. *INS*:
87 F.3d 672 (5th Cir. 1996), cert. denied, 117 S. Ct. 694 (1997) 11, 12, 15
117 S. Ct. 694 (1997) 6-7
Murray's Lessee v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856) 18, 19
Ng Fung Ho v. *White*, 259 U.S. 276 (1922) 17
Northern Pipeline Constr. Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) 18, 19
Ortwein v. *Schwab*, 410 U.S. 656 (1973) 17
Qasguargis v. *INS*, 117 S. Ct. 1080 (1997) 7

Cases—Continued: Page

Railroad Co. v. *Grant*, 98 U.S. 398 (1879) 10
Reyes-Hernandez v. *INS*, 89 F.3d 490 (7th Cir. 1996) 5
Salazar-Haro v. *INS*:
95 F.3d 309 (3d Cir. 1996), cert. denied, 117 S. Ct. 1842 (1997) 12, 21
117 S. Ct. 1842 (1997) 6, 8
Santos v. *INS*, No. 96-8501 (Oct. 6, 1997) 6
Scheidemann v. *INS*, 83 F.3d 1517 (3d Cir. 1996) . 8, 9
Sherman v. *Grinnell*, 123 U.S. 679 (1887) 10
Soriano, In re, Int. Dec. No. 3289, 1997 WL 159795 (Feb. 21, 1997) 8
Stone v. *INS*, 514 U.S. 386 (1995) 9
Superintendent v. *Hill*, 472 U.S. 445 (1985) 18
The Assessors v. *Osbornes*, 76 U.S. (9 Wall.) 567 (1870) 10-11
Turkhan v. *INS*, 123 F.3d 487 (7th Cir. 1997)..... 12, 14, 22
Uwagbale v. *INS*, 117 S. Ct. 1338 (1997) 6
Webster v. *Doe*, 486 U.S. 592 (1988) 17

Constitution, statutes and regulation:

U.S. Const.:
Art. I, § 9, Cl. 2 (Suspension Clause) 15, 22
Art. III 20, 21
§ 1 18
Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657 4
Administrative Procedure Act, 5 U.S.C. 701(a)(2) .. 20
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 4
§ 440, 110 Stat. 1276 ..... 11, 14
§ 440(a), 110 Stat. 1276-1277 . 4, 5, 6, 9, 11, 13, 14, 15, 22
§ 440(d), 110 Stat. 1277 ..... 4, 5, 7, 8
§ 440(e), 110 Stat. 1278 11
§ 440(f), 110 Stat. 1278 11

Statutes and regulation—Continued: Page

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546:
§ 304, 110 Stat. 3009-587 7
§ 304(a)(3), 110 Stat. 3009-594 7
§ 304(b), 110 Stat. 3009-597 7
§ 306, 110 Stat. 3009-607 4
§ 306(c), 110 Stat. 3009-612 4
§ 309(a), 110 Stat. 3009-625 4
§ 309(c), 110 Stat. 3009-625 4
§ 309(c)(1)(B), 110 Stat. 3009-625 9
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
§ 101(a)(43)(B), 8 U.S.C. 1101(a)(43)(B) (1994 & Supp. II 1996) 7
§ 106, 8 U.S.C. 1105a (1994) 4, 22, 23
§ 106(a), 8 U.S.C. 1105a(a) (1994) 4
§ 106(a)(10), 8 U.S.C. 1105a(a)(10) (1994) 4, 5
§ 106(a)(10), 8 U.S.C. 1105a(a)(10) (Supp. II 1996) 4, 5, 6, 13, 14, 15, 16
§ 106(c), 8 U.S.C. 1105a(c) (1994) 9
§ 212(c), 8 U.S.C. 1182(c) (Supp. IV 1992) 2, 3
§ 212(c), 8 U.S.C. 1182(c) (1994) 4, 5, 7, 8, 9, 14, 20
§ 240A, 8 U.S.C. 1229b (Supp. II 1996) 7
§ 240A(a)(3), 8 U.S.C. 1229b(a)(3) (1994 & Supp. II 1996) 7
§ 241(a)(2)(B), 8 U.S.C. 1251(a)(2)(B) (1994) 7
§ 241(a)(2)(B)(i), 8 U.S.C. 1251(a)(2)(B)(i) (Supp. IV 1992) 2
§ 241(a)(2)(B)(i), 8 U.S.C. 1251(a)(2)(B)(i) (1994) 5
§ 242, 8 U.S.C. 1252 (Supp. II 1996) 4
§ 242(a)(2)(C), 8 U.S.C. 1252(a)(2)(C) (Supp. II 1996) 4
§ 242(g), 8 U.S.C. 1252(g) (Supp. II 1996) 22

Statutes and regulation—Continued: Page

28 U.S.C. 2241 ..... 22, 23
8 C.F.R. 3.1(h)(iii) 8

Miscellaneous:

Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915 (1988) 19-20
S. Rep. No. 48, 104th Cong., 1st Sess. (1995) 20

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 109 F.3d 1185. The decisions of the Board of Immigration Appeals (Pet. App. 26a-28a) and the immigration judge (Pet. App. 29a-34a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1997. A petition for rehearing was denied on May 14, 1997. Pet. App. 24a-25a. The petition for a writ of certiorari was filed on August 12, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a native and citizen of Greece, entered the United States as a lawful permanent resident in 1972. Pet. App. 29a. In 1987, petitioner was convicted of burglary of an automobile and sentenced to probation. *Id.* at 31a. In 1988, he was convicted of possession of marijuana and sentenced to supervision. *Ibid.* In 1991, petitioner accumulated two further convictions, for possession of cocaine on one occasion and possession of heroin on another, in each case with the intent to distribute the drugs; he was sentenced to probation and was required to enroll as an inpatient in a substance abuse program and thereafter to participate in a drug rehabilitation program. *Id.* at 28a, 31a. Petitioner was expelled from the inpatient program after being arrested once again for possession of a controlled substance; he was later reinstated in the program as an outpatient, but then expelled again for failure to appear for treatment on two occasions. *Id.* at 31a. In 1993, petitioner was convicted of possession of cocaine and sentenced to a term of three years in prison, of which he served approximately one year before being released on parole. *Id.* at 32a.

In June 1993, the Immigration and Naturalization Service (INS) instituted deportation proceedings against petitioner on the ground that his drug convictions made him deportable under former Section 241(a)(2)(B)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(2)(B)(i) (Supp. IV 1992). Pet. 2; Pet. App. 29a-30a. Petitioner, through counsel, admitted all of the allegations against him and conceded his deportability. Pet. App. 30a. He applied, however, for a discretionary waiver of deportation under former Section 212(c) of the INA, 8 U.S.C.

1182(c) (Supp. IV 1992). Pet. App. 30a. An immigration judge (IJ) found that petitioner met the minimum statutory requirements to be eligible for a waiver under Section 212(c) (Pet. App. 30a), but he denied relief, as a matter of discretion, because "upon careful consideration of all the evidence of record, * * * the favorable factors advanced by [petitioner were] not sufficient to outweigh the serious, adverse factors militating against a grant of relief, most significantly the lack of a showing of rehabilitation" (*id.* at 34a). The IJ therefore ordered petitioner deported to Greece. *Ibid.*

2. Petitioner appealed the denial of discretionary relief to the Board of Immigration Appeals (BIA or Board), arguing chiefly that the IJ had erroneously required a showing of "full and complete" rehabilitation. Pet. App. 27a. In rejecting petitioner's challenge to the IJ's order, the Board made clear that there was no "absolute prerequisite" that a criminal alien make a "clear showing of reformation" in order to merit a favorable exercise of discretion under former Section 212(c). *Ibid.* On the facts of petitioner's case, however, the Board held that it had "considered [petitioner's] efforts towards rehabilitation as one of the factors in his favor," but that "given [petitioner's] long criminal record from 1987 to 1993, his past drug use, and his past failure to complete a drug intervention program," it was "not adequately convinced on the facts before [it] that [petitioner's] life of crime ha[d] stopped." *Id.* at 28a. Thus, this was "not a case in which [the Board] would grant discretionary relief absent a clearer showing of rehabilitation than [was] present here." *Ibid.*

3. The BIA's decision was entered on March 7, 1996. See Pet. 3.[1] Petitioner then sought review in the United States Court of Appeals for the Seventh Circuit, under the provision for judicial review contained at that time in Section 106(a) of the INA, 8 U.S.C. 1105a(a) (1994).

On April 24, 1996, while the petition for review was pending, the President signed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. Section 440(a) of AEDPA, 110 Stat. 1276-1277, amended what was then Section 106(a)(10) of the INA (previously codified at 8 U.S.C. 1105a(a)(10) (1994)) to provide, in pertinent part:

> Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D) * * * shall not be subject to review by any court.

8 U.S.C. 1105a(a)(10) (Supp. II 1996).[2] Section 440(d) of AEDPA further amended former Section 212(c) of

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[1] The date of the BIA's order is misprinted in the appendix to the petition (at 26a).

[2] Section 306 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-607, repealed Section 106 of the INA in its entirety and replaced it with a new Section 242, 8 U.S.C. 1252 (Supp. II 1996), which governs judicial review of what are now known as "orders of removal." That change is generally effective only with respect to administrative proceedings commenced on or after April 1, 1997. See IIRIRA §§ 306(c), 309(a) and (c), 110 Stat. 3009-612, 3009-625, as amended by Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657. New Section 242(a)(2)(C), 8 U.S.C. 1252(a)(2)(C) (Supp. II 1996), contains a

the INA, 8 U.S.C. 1182(c) (1994), to eliminate the Attorney General's authority to grant discretionary relief from deportation to any alien who was "deportable by reason of having committed any [such] criminal offense." 110 Stat. 1277.

The court of appeals dismissed the petition for review for lack of jurisdiction in light of AEDPA. Pet. App. 1a-23a. Because petitioner is deportable under former Section 241(a)(2)(B)(i) of the INA (previously codified at 8 U.S.C. 1251(a)(2)(B)(i) (1994)), by reason of his drug-crime convictions, the court concluded that Section 106(a)(10) of the INA, as amended by Section 440(a) of AEDPA, precludes judicial review of the final order of deportation entered against him. Pet. App. 8a-11a, 23a. Agreeing with "[e]very court of appeals that has considered the question," the court held that because Section 440(a) "curtails the jurisdiction of the courts it is presumptively effective on enactment." *Id.* at 8a. The court noted that its earlier decision in *Reyes-Hernandez* v. *INS*, 89 F.3d 490 (1996), which expressed concern about aliens who might have waived "colorable defense[s]" to deportability in the expectation that they could obtain judicial review if their claims for discretionary relief were denied, could have no application in this case, because petitioner "concede[d] that [he] lack[ed] a colorable defense to deportation." Pet. App. 10a.

The court rejected petitioner's claims of constitutional entitlement to judicial review. Pet. App. 17a-23a. First, the court stated that petitioner had no constitutional (or statutory) right to seek a writ of

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review-preclusion provision similar to that in former Section 106(a)(10).

habeas corpus for the purpose of securing "review of discretionary decisions by the political branches of government." *Id.* at 18a-19a. Moreover, although "aliens who have lawfully entered the United States are entitled to due process of law before they may be deported" (*id.* at 19a), the court held that the administrative procedures afforded under the INA, together with the opportunity to challenge, in the court of appeals, any failure to satisfy the requirements for preclusion of review under the amended Section 106(a)(10) (*i.e.*, that the subject of the proceedings be "(i) an alien who is (ii) deportable (iii) by reason of [having committed specified] serious crimes," *id.* at 20a), provided petitioner with "the process that the Constitution requires, and more besides" (*id.* at 21a) (citation omitted). Finally, the court rejected petitioner's argument based on separation-of-powers principles, because "[u]nless Article III *compels* Congress to vest in the inferior federal courts as much judicial power as Article III *permits* them to possess—an inconceivable reading of the Constitution—it interposes no obstacle to the amended § 106(a)(10)." *Id.* at 23a.

ARGUMENT

1. Petitioner argues (Pet. 8-13) that the court of appeals erred in holding that Section 440(a) of AEDPA divested it of jurisdiction over his petition for judicial review, which was pending at the time AEDPA was enacted. This Court has recently denied review in five cases raising the same issue. See *Santos* v. *INS*, No. 96-8501 (Oct. 6, 1997); *Salazar-Haro* v. *INS*, 117 S. Ct. 1842 (1997); *Uwagbale* v. *INS*, 117 S. Ct. 1338 (1997); *Chamorro-Torres* v. *INS*, 117 S. Ct. 1106 (1997); *Mendez-Rosas* v. *INS*, 117 S. Ct.

694 (1997); see also *Qasguargis* v. *INS*, 117 S. Ct. 1080 (1997). There is no reason for a different result here.

a. We note at the outset that petitioner's request for judicial review of the BIA's order is effectively moot, because the Attorney General no longer has the authority to grant the relief that petitioner seeks—a waiver of deportation under former Section 212(c) of the INA. Section 440(d) of AEDPA, 110 Stat. 1277, amended Section 212(c) to exclude from the scope of its discretionary waiver provision "an[y] alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2) * * * (B)" of the INA (previously codified at 8 U.S.C. 1251(a)(2)(B) (1994)). Petitioner conceded before the immigration judge (Pet. App. 30a) that he has been convicted of several drug crimes, each of which is a violation "relating to a controlled substance" that is "covered in" Section 241(a)(2)(B). Thus, petitioner is no longer statutorily eligible for the discretionary relief that he seeks through this proceeding.[3]

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[3] Section 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-587, repealed Section 212(c) in its entirety and replaced it with Section 240A of the INA, 8 U.S.C. 1229b (Supp. II 1996), which authorizes a new form of discretionary relief termed "cancellation of removal." See IIRIRA § 304(a)(3) and (b), 110 Stat. 3009-594, 3009-597. With certain limited exceptions not applicable here, IIRIRA's provisions respecting cancellation of removal apply only to administrative proceedings initiated on or after April 1, 1997. See note 2, *supra*. In any event, petitioner's 1991 drug-trafficking convictions would make him ineligible for relief under the new provisions. See INA §§ 101(a)(43)(B), 240A(a)(3) (as amended by IIRIRA), 8 U.S.C. 1101(a)(43)(B), 1229b(a)(3) (1994 & Supp. II 1996).

AEDPA does not specify whether Section 440(d) bars the Attorney General from acting on a petition for relief under former Section 212(c) filed by a criminal alien on or before the date of AEDPA's enactment. In a case referred to her by the BIA under 8 C.F.R. 3.1(h)(iii), however, the Attorney General concluded that the amendments made by Section 440(d) apply to cases that were pending before the Executive Office for Immigration Review on the date of enactment. *In re Soriano*, BIA Int. Dec. No. 3289, 1997 WL 159795 (Feb. 21, 1997).[4] Discretionary relief under the immigration laws is prospective in nature, and Section 440(d) limits the Attorney General's power to confer such relief. *Ibid.*[5] Because

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[4] We lodged a copy of the Attorney General's opinion in *In re Soriano* with the Clerk of this Court at the time we filed our brief in opposition to the certiorari petition in No. 96-1310, *Salazar-Haro* v. *INS*, cert. denied, 117 S. Ct. 1842 (1997). See also the government's supplemental brief (at 15-19) filed in response to the Court's order of September 5, 1996 (117 S. Ct. 28) in *INS* v. *Elramly*, No. 95-939, vacated and remanded, 117 S. Ct. 31 (1996).

[5] See *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("The deportation hearing looks prospectively to the respondent's right to remain in this country in the future."); see also *Scheidemann* v. *INS*, 83 F.3d 1517, 1523 (3d Cir. 1996) ("Like statutes altering the standards for injunctive relief," changes in the scope of the Attorney General's discretionary authority "ha[ve] only a prospective impact."). Moreover, just as new "jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties,'" *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 274 (1994), the repeal of Section 212(c) speaks to the power of the Attorney General to waive deportation, not to any "right" of an alien to obtain such relief. The principles underlying the present application of jurisdictional rules to pending cases, discussed below, thus apply equally to cases involving the Attorney General's power

the Attorney General lacks any authority under current law to grant petitioner's request for a waiver of deportation under Section 212(c), even a judicial reversal of the BIA's previous discretionary decision to deny relief could not avail petitioner now.[6]

b. The court of appeals correctly concluded (Pet. App. 8a-11a) that Section 440(a) of AEDPA operated immediately upon its enactment to divest the court of jurisdiction to review petitioner's pending case. In *Landgraf* v. *USI Film Products*, 511 U.S. 244, 273 (1994), this Court explained that "application of new statutes passed after the events in suit is unquestion-

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to act. See *Scheidemann*, 83 F.3d at 1523 ("Like statutes constricting the jurisdiction of a judicial body," changes to the class of aliens eligible for Section 212(c) relief "speak only to the power of a public agency.").

[6] We also note that, so far as we are aware, the final order of deportation outstanding against petitioner is not presently subject to any judicial or administrative stay. We are informed by the INS that petitioner was ordered to report for deportation on August 14, 1997, but that on August 7 he asked the INS to allow him to "self-deport." The INS consented. When petitioner evidently failed to leave the country, the INS again ordered him to report for deportation, this time on September 9. Petitioner failed to report. If the INS locates and deports petitioner, no court will have jurisdiction to conduct any further review of the proceedings that resulted in the order of deportation. 8 U.S.C. 1105a(c) (1994) (still applicable to this case under IIRIRA § 309(c)(1)(B), 110 Stat. 3009-625); *Stone* v. *INS*, 514 U.S. 386, 399 (1995) ("Once an alien has been deported, the courts lack jurisdiction to review the deportation order's validity."). Petitioner's failure to comply with the terms of the deportation order, without seeking a further stay, may also affect the propriety of according him discretionary review in this Court. Cf. *Degen* v. *United States*, 116 S. Ct. 1777, 1781 (1996) (discussing fugitive disentitlement doctrine).

ably proper in many situations." In particular, the Court noted that "intervening statutes conferring or ousting jurisdiction" are ordinarily given immediate effect, "whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Id.* at 274. A new law "normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" *Ibid.*[7]

Landgraf reaffirmed the long-standing principle that "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law." *Bruner* v. *United States*, 343 U.S. 112, 116-117 (1952) (citing *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 234 (1922); *Gwin* v. *United States*, 184 U.S. 669, 675 (1902); *Gurnee* v. *Patrick County*, 137 U.S. 141, 144 (1890); *Sherman* v. *Grinnell*, 123 U.S. 679, 680 (1887); *Railroad Co.* v. *Grant*, 98 U.S. 398, 401 (1879); and *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)). "When the very purpose of Congress is to take away jurisdiction, of course it does not survive, even as to pending suits, unless expressly reserved. * * * If the aim is to destroy a tribunal or to take away cases from it, there is no basis for finding saving exceptions unless they are made explicit." *De La Rama S.S. Co.* v. *United States*, 344 U.S. 386, 390 (1953). Accord *The Assessors* v. *Osbornes*, 76 U.S.

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[7] Accord *Landgraf*, 511 U.S. at 293 (Scalia, J., concurring in the judgments) ("Our jurisdiction cases are explained * * * by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power—so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised.").

(9 Wall.) 567, 575 (1870); *Insurance Co.* v. *Ritchie*, 72 U.S. (5 Wall.) 541, 544 (1867).

No provision of AEDPA preserves the jurisdiction of the courts of appeals over petitions for review that were pending at the time of its enactment.[8] Accordingly, Section 440(a) operated immediately to eliminate that jurisdiction. Although the dismissal of pending petitions may disappoint litigants who anticipated a further level of review, cf. Pet. 24, a new provision is not impermissible "merely because it * * * upsets expectations based in prior law." *Landgraf*, 511 U.S. at 269. Like other new jurisdictional provisions, Section 440(a) speaks immediately and prospectively to deny courts the power to review final orders of deportation entered against aliens who are deportable because they have been convicted of drug-related offenses. *Id.* at 274.

The court of appeals' conclusion in this case is consistent with the decisions of the nine other courts of appeals that have considered the issue, all of which have dismissed similar petitions that were pending before them at the time of AEDPA's enactment. See *Mendez-Morales* v. *INS*, 119 F.3d 738 (8th Cir. 1997); *Fernandez* v. *INS*, 113 F.3d 1151, 1155 (10th Cir. 1997); *Figueroa-Rubio* v. *INS*, 108 F.3d 110 (6th Cir.

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[8] Section 440(f) of AEDPA provides that the amendments made by Section 440(e) (relating to modifications made to the definition of "aggravated felony") "apply to convictions entered on or after the date of [enactment]." 110 Stat. 1278. There is no provision regarding the effective date of other subsections of Section 440, however, and provisions relating to various other sections provide no reliable indication of Congress's intent in that regard. See *Duldulao* v. *INS*, 90 F.3d 396, 398 n.2 (9th Cir. 1996); *Mendez-Rosas* v. *INS*, 87 F.3d 672, 675 & n.4 (5th Cir. 1996), cert. denied, 117 S. Ct. 694 (1997).

1997); *Boston-Bollers* v. *INS*, 106 F.3d 352, 354-355 (11th Cir. 1997); *Kolster* v. *INS*, 101 F.3d 785, 787-791 (1st Cir. 1996); *Salazar-Haro* v. *INS*, 95 F.3d 309, 310-311 (3d Cir. 1996), cert. denied, 117 S. Ct. 1842 (1997); *Hincapie-Nieto* v. *INS*, 92 F.3d 27, 29 (2d Cir. 1996); *Duldulao* v. *INS*, 90 F.3d 396, 398-400 (9th Cir. 1996); *Mendez-Rosas* v. *INS*, 87 F.3d 672, 674-676 (5th Cir. 1996), cert. denied, 117 S. Ct. 694 (1997).

c. Petitioner argues (Pet. 9-13) that this Court should grant the petition, vacate the decision below, and remand this case to the court of appeals for reconsideration in light of this Court's decisions in *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 117 S. Ct. 1871 (1997), and *Lindh* v. *Murphy*, 117 S. Ct. 2059 (1997). The Seventh Circuit has, however, recently rejected the argument that petitioner would make to that court on remand, concluding (in a case argued by petitioner's counsel of record, but not decided until the day the petition in this case was filed) that the decisions in *Hughes* and *Lindh* "do not affect [its] conclusion that § 440(a) applies to pending cases." *Turkhan* v. *INS*, 123 F.3d 487, 488 n.3 (7th Cir. 1997). There is therefore no reason to direct the court of appeals to revisit the issue in the present case.

In any event, nothing in the decision below is inconsistent with *Hughes* or *Lindh*. As the Seventh Circuit pointed out in *Turkhan*, 123 F.3d at 488 n.3, *Hughes* "tells us only that statutes creating new causes of action—even though phrased in jurisdictional terms—can have prohibited retroactive effects." Thus, in *Hughes*, the Court held that the new statutory provision at issue "eliminate[d] a defense to a *qui tam* suit * * * and therefore change[d] the substance of the existing cause of action." 117 S.

Ct. at 1877. Section 440(a)'s amendment to Section 106(a)(10) of the INA, by contrast, neither varies any statutory standard regarding eligibility for discretionary relief from deportation nor directs any change in the way the Attorney General exercises her statutory discretion in granting or denying such relief; it merely strips courts of any ability to review the exercise of that discretion in a limited class of cases involving aliens who are deportable because they have been convicted of certain serious crimes. The new provision at issue here therefore affects only the amount (one appeal or two) and type (administrative or judicial) of review available to petitioner, not the substantive standards applicable to his request for discretionary administrative relief. Such a provision "merely allocate[s] jurisdiction among fora," thus regulating "the secondary conduct of litigation and not the underlying primary conduct of the parties"; it is precisely the sort of "jurisdiction-allocating statute[]" that courts "often apply * * * to pending cases." *Id.* at 1878; see *Hallowell* v. *Commons*, 239 U.S. 506, 508 (1916) (provision divesting courts of jurisdiction and committing certain land claims to "final and conclusive" decision by Secretary of the Interior "takes away no substantive right but simply changes the tribunal that is to hear the case").[9]

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[9] Petitioner argues (Pet. 11) that Section 440(a) is impermissibly retroactive because it "divests *all courts* of jurisdiction to review final orders of deportation subject to its terms, thus impacting the substantive ability of aliens to seek relief against unlawful orders of deportation." The Court's analysis in *Hughes* does not turn on whether a provision allocates jurisdiction between judicial fora or between a judicial forum and an administrative one. Compare *Hallowell*, 239 U.S. at 508-

Petitioner's reliance on *Lindh* is equally misplaced. The Court in that case found no reason to resort to general principles governing the prospective or retroactive application of statutes (see 117 S. Ct. at 2062-2063), because a thorough contextual analysis of the statute at issue (*id.* at 2063-2068) "reveal[ed] Congress's intent to apply the amendments [in question] only to such cases as were filed after the statute's enactment" (*id.* at 2063). In conducting that analysis, the Court focused solely on the provisions of Title I of AEDPA, which it expressly noted (*id.* at 2063) "stands more or less independent of the Act's other titles"—including Title IV, which contains Section 440(a). The courts of appeals that have considered Title IV of AEDPA, in the context of claims like petitioner's, have concluded that its provisions yield no specific textual indication of Congress's intent with regard to the effective date of Section 440(a). See *Turkhan*, 123 F.3d at 488 n.3; *Mendez-Morales*, 119 F.3d at 739 n.1 (the "drafting peculiarities of Title I" are irrelevant in

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509. Even if it did, however, this case presents no question concerning judicial review of "unlawful" deportation orders. The court of appeals held that new Section 106(a)(10) permits judicial review of whether an individual who has been ordered deported is properly subject to that Section's jurisdictional bar —that is, whether he or she is, in fact, "(i) an alien who is (ii) deportable (iii) by reason of [certain] serious crimes" specified in the INA. Pet. App. 20a. Petitioner himself concedes that he meets all of those conditions. See, *e.g.*, Pet. 2. Petitioner's only claim is that he is entitled to *judicial* review of a decision explicitly (and formerly) committed, by Congress, to the administrative discretion of the Attorney General. See 8 U.S.C. 1182(c) (1994); compare *INS* v. *Yang*, 117 S. Ct. 350 (1996). That claim does not relate to petitioner's "substantive ability * * * to seek relief" from an "unlawful" order.

determining the intended reach of Section 440); *Hernandez-Rodriguez* v. *Pasquarell*, 118 F.3d 1034, 1046 (5th Cir. 1997); *Duldulao*, 90 F.3d at 398 n.2; *Mendez-Rosas*, 87 F.3d at 675 & n.4. They have therefore properly applied the general principles regarding temporal reach articulated in *Landgraf* and recognized, but found inapplicable, in *Lindh* (see 117 S. Ct. at 2062-2063).

d. The particular statutory issue that petitioner seeks to raise affects only a limited and rapidly diminishing class of cases in which petitions for judicial review brought by alien felons were pending before the courts of appeals when the AEDPA was enacted in April, 1996. Moreover, as noted above (see note 3, *supra*), Congress has comprehensively revised the entire statutory framework relating to discretionary relief from deportation, with general effect as of April 1, 1997. The question whether Section 440(a)'s amendment of Section 106(a)(10) of the INA—a provision that has now been repealed in its entirety (see note 2, *supra*)—was or was not immediately effective is therefore of little continuing importance. For that reason, and in light of the unanimity of the ten courts of appeals that have addressed the question, review by this Court is not warranted.

2. Petitioner argues further (Pet. 13-30) that Section 440(a)'s provisions restricting judicial review of final deportation orders entered against criminal aliens deny him due process, contravene constitutional separation-of-powers principles, and violate the Suspension Clause. None of those claims warrants review in this case.

a. Petitioner has not been denied due process. He does not contend, for instance, that he was not given

adequate notice of the proceedings against him, or of the grounds on which the INS sought to deport him. Nor does he complain of any procedural flaw in the conduct of his deportation hearing, during which he was represented by counsel (see Pet. App. 30a), or in the review he received on the merits from the Board of Immigration Appeals. Nor, indeed, does he argue that there is any ground for questioning the immigration judge's conclusion (based on petitioner's own concession) that he is legally deportable. See *ibid.*[10] Petitioner's only substantive contention is that the IJ or the BIA, acting on behalf of the Attorney General, should, on the particular facts of petitioner's case, have afforded him discretionary relief from the deportation that his previous misconduct otherwise required; and his only "due process" claim is that he was constitutionally entitled to judicial review of their contrary discretionary judgment.

That claim is unavailing. As the court of appeals recognized, the Constitution does not require judicial

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[10] Even if petitioner were in a position to assert the rights of a criminal alien with a colorable defense to deportability (which he is not), this case would not present that issue. The court of appeals made clear (Pet. App. 11a-13a, 20a) that it reserved the right to review whether or not the party seeking review was, in fact, an alien who was deportable by reason of having committed certain specified crimes, in order to satisfy itself that Section 106(a)(10) was being properly applied in a particular case. Petitioner received no such review because he conceded alienage, deportability, and the relevant criminal history. *Id.* at 30a. Although petitioner alleges a conflict in the lower courts on that issue (Pet. 14), any such disagreement would not warrant review in petitioner's case, where the court of appeals stood ready to review both deportability and the substance of petitioner's criminal history had petitioner not conceded both points.

review of discretionary administrative decisions of the sort involved here—particularly because they do not, by definition, involve legal entitlements or fundamental rights, but only choices concerning whether particular aliens, unquestionably subject to deportation, nonetheless merit some unusual degree of executive forbearance. See Pet. App. 21a-22a; *Ortwein* v. *Schwab*, 410 U.S. 656, 658-660 (1973) (per curiam) (no due process right to judicial review of administrative benefits determination); *Carlson* v. *Landon*, 342 U.S. 524, 537 (1952) ("The power to expel aliens, being essentially a power of the political branches of government, the legislative and executive, may be exercised entirely through executive officers, 'with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.'"); *Ng Fung Ho* v. *White*, 259 U.S. 276, 280 (1922); *Fong Yue Ting* v. *United States*, 149 U.S. 698, 713 (1893); see generally *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956); *Galvan* v. *Press*, 347 U.S. 522, 531 (1954); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 586-587 (1952).

At most, this Court has recognized that a "serious constitutional question" might arise "if a federal statute were construed to deny any judicial forum for a *colorable constitutional claim*." *Webster* v. *Doe*, 486 U.S. 592, 603 (1988) (emphasis added). Petitioner, by contrast, alleges no more than that the immigration judge and the BIA resolved against him a perhaps debatable question of personal character, and therefore denied him discretionary relief from an order of deportation that he concedes is legally authorized. See Pet. App. 27a-28a, 30a, 33a-34a.[11] That fact-bound,

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[11] Given the non-constitutional nature of petitioner's underlying challenge to the IJ's and the BIA's discretionary decision,

non-constitutional claim does not engage even the tentative concern expressed in *Webster*, and the question whether petitioner was constitutionally entitled to a judicial forum in which to raise it does not merit this Court's review.

b. Petitioner contends (Pet. 22-27) that denying the courts jurisdiction to review challenges brought by deportable alien felons to administrative denials of discretionary relief from deportation threatens "the structural integrity of our tripartite form of government" (Pet. 23). That claim is not well founded.

The Constitution vests "[t]he judicial Power of the United States" in this Court and in "such inferior Courts as the Congress may from time to time ordain and establish." Art. III, § 1. It does not follow, however, that the federal courts—in particular, those "inferior Courts" established by Congress, rather than by the Constitution itself—are automatically seized of jurisdiction over every issue to which the judicial power might constitutionally extend. To the contrary, as the court of appeals recognized, "[t]he power to establish the inferior federal courts * * * permits Congress to determine their jurisdiction." Pet. App. 22a (citing *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 57-60 (1982) (opinion of Brennan, J.), and *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.)

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the academic debate petitioner describes (Pet. 13-15) concerning judicial review of administrative decisions that "implicat[e] fundamental rights" (Pet. 13, quoting *Superintendent* v. *Hill*, 472 U.S. 445, 450 (1985)) is irrelevant here. The specific decisional conflicts that petitioner alleges (Pet. 14-15) are similarly irrelevant to this case. See note 10, *supra*, and pages 22-23 & note 15, *infra*.

272, 284 (1856)); see, *e.g.*, *Keene Corp.* v. *United States*, 508 U.S. 200, 207 (1993); *Finley* v. *United States*, 490 U.S. 545, 547-548 (1989); *Hallowell*, 239 U.S. at 509. In particular, as relevant here, "there are matters, *involving public rights*, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Northern Pipeline*, 458 U.S. at 67 (opinion of Brennan, J.) (quoting *Murray's Lessee*, 59 U.S. (18 How.) at 284) (emphasis added in *Northern Pipeline*).

The "public-rights doctrine * * * draws upon the principle of separation of powers, and a historical understanding that certain prerogatives were reserved to the political Branches of Government." *Northern Pipeline*, 458 U.S. at 67 (opinion of Brennan, J.); see also *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929). It extends to "matters arising 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments,'" and to "matters that historically could have been determined exclusively by those departments." *Northern Pipeline*, 458 U.S. at 67-68 (opinion of Brennan, J.) (quoting *Crowell* v. *Benson*, 285 U.S. 22, 50 (1932)). In that regard, Congress's plenary authority over matters respecting immigration, and its vesting of adjudicatory authority over such matters in administrative agencies, are paradigmatic. *Northern Pipeline*, 458 U.S. at 69 n.22 (opinion of Brennan, J.) (quoting *Crowell*, 285 U.S. at 51); Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 967

(1988) ("[B]ecause of the longstanding assumption that the executive and legislative branches possess plenary power over immigration issues, the surrounding body of law falls within the public rights category.") (footnote omitted).

So far as Article III is concerned, then, Congress is generally free to provide as much or as little judicial review of administrative decisions in immigration proceedings (including exclusion, deportation, admission, or removal proceedings) as it deems appropriate, including no review at all. Whatever limits, if any, there may be to that proposition, this case does not test them. Petitioner conceded deportability, and he contests only the decision made, on the facts of his case, not to accord him a form of administrative "grace" that Congress formerly permitted to be offered to worthy individuals "*in the discretion of the Attorney General.*" 8 U.S.C. 1182(c) (1994) (emphasis added); see *INS* v. *Yang*, 117 S. Ct. 350, 352 (1996); compare, *e.g.*, the cases cited at Pet. App. 21a-22a; 5 U.S.C. 701(a)(2) (excepting from review under the Administrative Procedure Act those actions that are "committed to agency discretion by law").[12] There is

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[12] We pause to note again that Congress has since forbidden the Attorney General to exercise such discretion in favor of *any* alien with a criminal history like petitioner's. See page 7 & note 3, *supra*. It seems pertinent to point out that an insistence on the constitutional necessity of multiple layers of review, judicial or otherwise, of decisions that Congress has clearly designated as discretionary may not redound to the overall or long-term benefit of the class of persons potentially eligible for relief. Rather, Congress's response may be simply to eliminate the discretion, in order to obviate the need for review. See, *e.g.*, S. Rep. No. 48, 104th Cong., 1st Sess. 3, 26 (1995) (noting that the deportation process for criminal aliens had become "byzantine" and that "[t]here is little reason for the

little doubt that the immigration judge and the BIA acted properly, on behalf of the Attorney General, in denying discretionary relief to petitioner on the facts of this case (see Pet. App. 26a-34a); but even if they had not, nothing in Article III of the Constitution would entitle petitioner to seek further review of that discretionary decision in court.

c. Finally, petitioner questions (Pet. 27-29) the court of appeals' observations (Pet. App. 18a-19a) concerning the availability of habeas corpus proceedings to seek review of administrative decisions to deny discretionary relief from deportation. The court, however, discussed the availability of habeas corpus relief only in the process of framing the quite different question presented by this case.

As the opinion below notes (Pet. App. 17a), some other courts of appeals, while upholding Congress's prerogative to deny ordinary judicial review procedures to deportable aliens with criminal records like petitioner's, have "observe[d] that limited opportunity to apply for a writ of habeas corpus may remain."[13] The court in this case, however, was "reluctant to place weight" (*id.* at 18a) on the potential

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multiple levels of appeal and delay in the deportation process which current law permits").

[13] See *Kolster*, 101 F.3d at 790 ("any habeas review that is required by the Constitution remains available"); *Salazar-Haro*, 95 F.3d at 311; *Hincapie-Nieto*, 92 F.3d at 30-31 (expressing "no opinion on the nature of the remedy or the scope of [habeas] review that remains available in any court"); *Duldulao*, 90 F.3d at 400 n.4 ("The availability and scope of collateral habeas review where the 'paramount law of the Constitution' may require judicial intervention was not an issue before us, and we need not decide whether section 440(a) purports to preclude it.") (citations omitted).

availability of the limited form of review that might be available through the non-statutory writ of habeas corpus protected from suspension by the Constitution (Art. I, § 9, Cl. 2), because in the court's view that writ would not lie to correct the sort of non-constitutional error, involving only "discretionary decisions by the political branches of government" (Pet. App. 18a), that petitioner alleges here. Similarly, the court declined to rely on the possibility that petitioner could obtain review under 28 U.S.C. 2241, both because that form of habeas, although broader than the constitutional minimum, also would not provide relief for the sort of error claimed by petitioner, and because the use of Section 2241 to seek review of deportation or removal proceedings has now been foreclosed by statute. Pet. App. 19a; see 8 U.S.C. 1252(g) (Supp. II 1996).[14]

The court of appeals was therefore willing to assume, for purposes of deciding this case, that if it applied Section 440(a)'s review-preclusion provision in accordance with its terms, then "[a]s a practical matter, the right to obtain review, in any court, on the theories [this] petitioner[] advance[s] is gone." Pet. App. 18a-19a. That assumption focused and, if anything, strengthened petitioner's claim that statutory (non-habeas) review could not constitutionally be foreclosed. Putting the court's statement in context also makes clear, however, that it is only petitioner's claim to statutory review, under former Section 106

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[14] The Seventh Circuit has made clear, in this and other cases, that, in its view, some form of habeas corpus review remains available for substantial constitutional claims. See Pet. App. 18a-19a; *Chow* v. *INS*, 113 F.3d 659, 668-669 (1997); *Turkhan*, 123 F.3d at 490.

of the INA (8 U.S.C. 1105a (1994), that is at issue here. Petitioner did not seek a writ of habeas corpus, either under 28 U.S.C. 2241 or directly under the Constitution, and his present claim that the court of appeals incorrectly described the availability of review in such a proceeding is no ground for further review in this case.[15]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[15] For the same reason, petitioner's claim (Pet. 15-16) of conflict among the courts of appeals concerning the availability and scope of habeas corpus review is irrelevant to this case.